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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA, New York, N.Y.

5 v. 17 Cr. 548 (JMF)

6 JOSHUA ADAM SCHULTE,

7 Defendant.
-----x

8 September 6, 2023
9 10:15 a.m.

10 Before:

11 HON. JESSE M. FURMAN,

12 U.S. District Judge

13
14 APPEARANCES

15 DAMIAN WILLIAMS
16 United States Attorney for the
17 Southern District of New York
BY: DAVID W. DENTON, JR.
18 MICHAEL D. LOCKARD
NICHOLAS S. BRADLEY
Assistant United States Attorneys

19 THE LAW FIRM OF CESAR de CASTRO, P.C.
20 Attorneys for Defendant
BY: CESAR DE CASTRO
SHANNON McMANNUS

21 ALSO PRESENT: KAYLA COLLINS, Paralegal Specialist
22 KIMBERLY TABARES, Paralegal Specialist

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your name for
3 the record.

4 MR. DENTON: Good morning, your Honor. David Denton,
5 Michael Lockard, and Nicholas Bradley for the government. With
6 us is paralegal from our office, Kayla Collins.

7 THE COURT: Good morning.

8 MR. DeCASTRO: Good morning. Cesar DeCastro, Shannon
9 McManus, and our paralegal Kimberly Tabares for Mr. Schulte,
10 who is seated between us.

11 THE COURT: Good morning, you may be seated.

12 All right. We are here for final pretrial conference.
13 My understanding is that Mr. Schulte was delayed for some
14 reason getting here from the MDC. I do plan to speak to the
15 marshals and the MDC just to ensure we don't have any issues of
16 that sort going forward until trial is over.

17 We have a bunch of stuff to cover today so I will jump
18 right in. Unless there is objection, I will start with an
19 allocution of Mr. Schulte a *Lafler Frye* allocution just to be
20 sure that if there was any plea offer made by the government,
21 that he has been advised of that and it is his decision to go
22 to trial.

23 Any objection to that from the government?

24 MR. DENTON: No objection. I would just note that
25 there was no formal plea offer, in the *Lafler Frye* sense,

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1 extended with respect to this case, your Honor.

2 THE COURT: And by this case you mean the three
3 charges that are to be tried?

4 MR. DENTON: Yes, your Honor. There was an offer made
5 prior to the 2022 trial that would have been a global
6 resolution that the defendant rejected. There has been no
7 subsequent plea offer since the resolution of the 2022 trial.

8 THE COURT: All right. And I assume that global plea
9 offer expired, if not before, then certainly with the 2022
10 trial; is that correct?

11 MR. DENTON: Long before, your Honor; yes.

12 THE COURT: Mr. DeCastro, any objection to my
13 inquiring on this front?

14 MR. DeCASTRO: No, judge.

15 THE COURT: All right. And Mr. DeCastro, is it
16 accurate to say that no plea offer has been made in connection
17 with the remaining charges, the three charges to be tried next
18 week?

19 MR. DeCASTRO: That's correct.

20 THE COURT: All right. And did you nevertheless
21 discuss with Mr. Schulte whether he should go to trial and/or
22 plead guilty, or alternatively plead guilty, notwithstanding
23 the absence of a plea offer?

24 MR. DeCASTRO: We have discussed it, yes.

25 THE COURT: And obviously don't tell me what it is,

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1 but did you make a recommendation to him as to whether he
2 should plead guilty or go to trial?

3 MR. DeCASTRO: I'm pausing because those are
4 conversations that we have at the lead up of every trial, of
5 course, and we have been having a lot of problems getting in
6 contact with Mr. Schulte. Yesterday we had a call, which my
7 understanding is he was produced to Brooklyn -- we didn't know
8 about -- they scheduled and confirmed the call.

9 THE COURT: Can you speak into the microphone?

10 MR. DeCASTRO: They scheduled, then confirmed a call
11 we never had. This morning we were here at 8:30 trying to see
12 he him, we never got to see him, they brought him directly
13 here. And so those are conversations that we certainly have to
14 continue but -- and, of course, I came in sort of little bit
15 later, as the Court knows, and I know those conversations had
16 taken place between prior counsel and Mr. Schulte, and then
17 Mr. Schulte was pro se, and so there is further conversations.
18 I just want to make sure that the record was clear on that.

19 THE COURT: All right. I will get in touch with the
20 court liaison from the MDC to also ensure that there are no
21 issues between now and the conclusion of trial with respect to
22 your communications with Mr. Schulte, that is, beyond the
23 ordinary ones given his circumstances, but I certainly want to
24 make sure that if there is an attorney call that it happens and
25 that you don't have any hiccups on that front.

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1 MR. DeCASTRO: It's one of those things where, quite
2 frankly, it is just let us know if it is not going to happen.
3 These are things that it seems like when a holiday happens, the
4 entire MDC is incapable of responding to any e-mails or calls.
5 I don't mean to -- I just want the Court to have some
6 information when you are talking to the liaison. It is just
7 quite frustrating, for example, days of calling to try to
8 figure out where his clothes are. I think that is completely
9 unacceptable. And we are trying to call the legal department
10 and that's what we are trying to do. I have a paralegal trying
11 to figure out they basically -- it's *hey, you can be here at*
12 *this hour, this time, bring the clothes or it's never going to*
13 *happen, and, you know, dropping the whole world when they tell*
14 *us to drop it as we are an inmate, is really very difficult and*
15 *so that's some of the hoops we are trying to go through and we*
16 *are trying to just manage as best we can.*

17 THE COURT: All right. I think some of it may be
18 because the head of the legal department is on leave and I
19 suspect that that has not helped matters, let's put it that
20 way. But, that being said, that is unacceptable and I will
21 contact them and look into it. Just so I understand, there was
22 a call that was supposed to happen yesterday and he wasn't
23 produced? Or what happened?

24 MR. DeCASTRO: So, my understanding is he was produced
25 for his case in the Eastern District and so I -- and

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1 Mr. Schulte confirmed that for me, that he was in the Eastern
2 District. Nobody called us, so we sat by the phone for an hour
3 waiting - because they do often call early in the morning
4 sometimes and just say, *Hey, can we do the call now?* Or they
5 call very late. So we just waited and we tried to call and of
6 course no one answers. So, we just sat around. But my
7 understanding is he was in court yesterday.

8 THE COURT: Mr. Denton?

9 MR. DENTON: Just on that point, your Honor.

10 We have been in contact with our colleagues in the
11 civil division in the Eastern District where the defendant has
12 a number of proceedings pending and in which I understand that
13 Judge Komitee has scheduled a number of actual in-person
14 proceedings, sometimes on relatively short notice. It is
15 obviously unfortunate that that was not communicated to the
16 defendant's criminal counsel here. We have certainly kept our
17 colleagues apprised of the schedule in this case, including the
18 proceeding today and the schedule for trial, but certainly any
19 assistance that the Court can provide with the MDC would be
20 very helpful on that score.

21 THE COURT: Well, I will be in touch with the MDC. I
22 will also get in touch with Judge Komitee and make sure that he
23 knows about our trial starting Monday and therefore doesn't
24 schedule anything that would conflict with it since trial,
25 obviously, takes precedence.

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1 Anything else, Mr. DeCastro? Or I will inquire
2 briefly of Mr. Schulte.

3 MR. DeCASTRO: No. I think just when you do talk to
4 the liaison, just to put on the list again, that we are at the
5 point where it is pointless to mail anything to him, he just
6 never gets it. I mean, he gets some things, certainly, but --
7 and it is just so difficult when we don't know who is in that
8 room that is there. So, if we show up and someone is using the
9 one room that is available for us, then we have to leave and
10 so -- I mean -- we are trying the case so we are ready to just
11 give him and show him things, which he is looking at right now,
12 things for the first time.

13 THE COURT: All right. So I was about to say for
14 better or for worse, you are going to be seeing each other
15 daily, and in that regard I assume not mailing anything and
16 some of these issues will be less of an issue during trial, but
17 be that as it may, I will certainly contact the Court liaison.

18 Mr. Schulte, let me ask you a few brief questions.
19 First, in the last 48 Hours have you taken any drugs, medicine,
20 pills, or had any alcohol?

21 THE DEFENDANT: Just typical medication prescribed to
22 me.

23 THE COURT: Is that the same medication that you have
24 been on during prior proceedings with me?

25 THE DEFENDANT: Yes.

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1 THE COURT: Is your mind clear today?

2 THE DEFENDANT: Yes.

3 THE COURT: And do you understand what's happened here
4 thus far today?

5 THE DEFENDANT: I do.

6 THE COURT: Did you hear my discussion with Mr. Denton
7 and Mr. DeCastro, for that matter, regarding the absence of any
8 plea offer in connection with the three charges on which you
9 will be tried next week?

10 THE DEFENDANT: Yes.

11 THE COURT: Is it correct to say that you would like
12 to go to trial and that you do not plan to plead guilty, or at
13 this time at least are not pleading guilty; is that correct?

14 THE DEFENDANT: That's correct.

15 THE COURT: All right. Does either counsel believe I
16 should ask Mr. Schulte any additional questions on that front?

17 MR. DENTON: No, your Honor.

18 MR. DeCASTRO: No Judge.

19 THE COURT: Great.

20 In that case, I am prepared to jump into the open
21 motions *in limine* but I don't know if it pays to get an update
22 first. The government's letter of last week suggested that
23 there might be some stipulations and other things that might
24 alter the nature of things, but perhaps you have already told
25 me the ways in which that would potentially affect the motions

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1 *in limine.* If the motions *in limine* are unaffected and there
2 is nothing to update I can proceed but I thought I would check.

3 MR. DENTON: No, your Honor.

4 I think the Court's order of yesterday was in accord
5 with our expectations for how our decision to forego certain
6 evidence would affect the motions *in limine*. Certainly with
7 respect to the open question as to Dr. Kiper's testimony that
8 was our intention foregoing some of that, was to take some of
9 those issues off the table. With respect to the stipulation, I
10 think that's a little bit been affected by counsel's ability to
11 communicate with the defendant. In the event that we are able
12 to reach that stipulation, I think we would be able to cut four
13 witnesses who would otherwise be necessary for authentication
14 and admission of digital evidence and that would leave us, as
15 we said in our letter, with the three witnesses who will
16 comprise the majority of the government's case-in-chief.

17 THE COURT: Let me deal with the motions *in limine* and
18 then we can turn to those sorts of issues. In light of my
19 order yesterday and my order of August 18, there are, I
20 believe, only a few remaining live issues, the first and most
21 significant concerns the display of the alleged child
22 pornography or I guess it is not alleged, it seems to be
23 conceded, that is to say the child sexual abuse materials. I
24 think there are two questions that are framed by the parties'
25 briefing and my order directing the government to file a reply;

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1 first, whether the materials are admissible at all; and second,
2 if so, in what manner they can be displayed, that is to say
3 whether they can be displayed to all the trial participants and
4 withheld from the public. The threshold question is obviously
5 whether the materials are admissible at all so I will start
6 with that.

7 The defendant's offer, or at least implicit offer to
8 stipulate that the materials are child pornography and that
9 anyone seeing the materials would know that it is child
10 pornography certainly makes this case closer than in -- and in
11 particular many of those cases cited by the government where,
12 as far as I can tell, the second part of the offer to
13 stipulate -- and again, I am sort of assuming that that is
14 implicit in the defendant's opposition -- the second part,
15 namely the concession that anyone who viewed the materials
16 would know that they are child pornography, I think most, if
17 not all of those cases, didn't have that component.

18 There is no question that that stipulation or, again,
19 effective offer to stipulate, has to be considered in the
20 Rule 403 balancing analysis, but I find it hard to see -- I
21 will certainly hear from defense counsel in short order, hard
22 to see how total preclusion of the evidence can be squared with
23 the principles articulated by the Supreme Court in its decision
24 in *Old Chief*. There, the Supreme Court reaffirmed the standard
25 rule that "a criminal defendant may not stipulate or admit his

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way out of the full evidentiary force of the case as the government chooses to present it." That is 519 US at 186-87. The Court further recognized that "the prosecution, with its burden of persuasion, needs evidentiary depth to tell a continuous story." That is page 190. And it recognizes that that evidence has force beyond any linear scheme or reasoning with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." At page 187; that that evidence can be used "not just to prove a fact but to establish its human significance and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment, thus the prosecution may fairly seek to place its evidence before the jurors as much to tell us a story of guiltiness as to support an inference of guilt to convince the jurors that a guilty verdict would be morally reasonable as much as to point the discrete elements of a defendant's legal fault." Pages 187 to 188.

That reasoning would seem to compel the conclusion that the government is entitled to prove its case by presenting at least some of the CSAM to the jury, notwithstanding the defendant's willingness to stipulate to both the fact that the materials are child pornography and that a viewer would readily recognize the fact that it was child pornography. Among other things, he is not stipulating to his own knowledge of that fact

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1 and on that score see the case that I cited in my order
2 yesterday, *United States v. Gonzalez* 2021 WL 948763 at pages 2
3 to 4, the District of Arizona decision dated March 12, 2021, in
4 which my former rules committee colleague, indeed the former
5 chair of the standing committee, reached that conclusion in
6 similar circumstances, that is where the defendant apparently
7 conceded or stipulated that material was child pornography and
8 that somebody who viewed it would know that. And, as that case
9 demonstrates, that doesn't mean that the government can do what
10 it wants without any limits. For instance, it may be that I
11 should limit the number of files that may be shown to the jury,
12 for how long and how many times, but it would seem to suggest
13 to me that total preclusion, as the defense argued in its
14 opposition without, I would note, any citation to *Old Chief* or
15 its progeny, would be inappropriate and, indeed, would be
16 error.

17 Mr. DeCastro, let me pause there and ask you what, if
18 anything, I am missing.

19 MR. DeCASTRO: Judge, I don't know that you are
20 missing that much except -- well, there is something I think I
21 can tell you that you are missing which is that, number one, we
22 are not saying that the government can't present its evidence.
23 Just the form of how they present it. Now, of course I think
24 everybody in this courtroom will agree that, and the government
25 has agreed that they want to limit it anyway given the nature

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of the evidence in the first place. There is ways that they can step, even with us saying, yes, it's child porn, anybody viewing it would know it is child pornography. The names of the file themselves are very prejudicial in and of themselves, the file name. This isn't a situation where you have file names that it is -- I don't know -- courtroom and then you open it and it is something else. They're very descriptive. And so that, in and of itself, is going to be in front of the jury. The government intends, with its experts, to show the filed listings, to show all the names of the files, and then what they then want to do is put up some of the photos and I understand the need to do that or wish to do that but I don't see why, given the overwhelming prejudice, that it would provide. The minute the jury sees that image, from our perspective, they're off. That's it. And they're not going to be focusing on the nuances which the parties have now limited the issues and surgically limited those issues to what matters.

And so, the Court can fashion a way that the jury can understand, even give an instruction as to what the defendant is conceding in this issue on this point, can talk the government can put up all the file names. They can describe the material. It is not that they're not -- it is not preclusion. I think the Court described it as preclusion. It is coming in, but what the Court could say is you can't sensationalize it. The government's point is, well, this is

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1 the material, it is what it is, we are allowed to show it. But
2 there is plenty of drug cases where they don't have to put the
3 drugs all out on the table. They're drugs, they put up a
4 forensic scientist who comes up and says they're drugs.

5 THE COURT: In my experience, they always put the
6 drugs on the table.

7 MR. DeCASTRO: They don't have to. There are times
8 when there are ways to limit it and so drugs, guns are bad
9 enough. We argue all the time on this side you can't put all
10 the guns up on the rail and many judges say it's fine, put them
11 all up on the rail but this is different. This material is so
12 inflammatory and it is so prejudicial that you run the risk of
13 the jury turning off and --

14 THE COURT: Can I ask you a question? Can you cite
15 any case, other than the Ninth Circuit case that I cited in my
16 order yesterday, where a Court did find it error to allow the
17 government to show, in some limited fashion -- let me be very
18 clear that if the government is permitted to show these images
19 to the jury, they will not be permitted to sensationalize it
20 and I am prepared to set pretty strict limits on the number of
21 images, how long they can be shown, and how many times they can
22 be shown.

23 So, assume for the moment that there will be strict
24 limits in that regard. Can you cite any case in which the
25 government was not permitted to or it was found to be error for

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1 the government to show it? And I don't think the Ninth Circuit
2 is authority for that because they're the Ninth Circuit. In
3 part they found that the balancing test was just the judge
4 didn't properly balance in allowing the jury to see the videos
5 because there was no evidence that the defendant had actually
6 viewed the videos and it was sufficient to show just the covers
7 of the videos. So in that regard, there were child sexual
8 abuse materials that were shown to the jury, it was just a
9 question of, essentially, the scope or the particulars.

10 MR. DeCASTRO: The answer is no, but the flip side is
11 that I don't have a case where a Court said that, You know
12 what? *What's the point of showing these when they're*
13 *overwhelmingly prejudicial?* What is the point when you have
14 the case names, the witnesses who are experts who can describe,
15 the fact that the defense stipulates that the element is gone.
16 I don't have any cases saying that is error to do that.

17 THE COURT: I think the point, first of all, it is not
18 up to me, it is up to the government, if they're permitted to
19 do it, whether they want to do it. But I think the point, to
20 quote Justice Souter, is to tell a story to the jury and to
21 convince the jury that a guilty verdict would be morally
22 reasonable as much as justified by the evidence. In other
23 words, I think the point is that -- and this is the way I read
24 *Old Chief* -- is that defendants can't force the government to
25 try a sterile case, that the government is entitled to

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1 demonstrate to the jury what is serious about this case and why
2 the conduct is serious and worthy of punishment. So, I think
3 that's the upshot.

4 MR. DeCASTRO: That's where I go back to, again, there
5 is not -- you have some cases where the defendant is trying to
6 obfuscate what the files are or something like that. I mean,
7 this is just clear from the names, and they are --

8 THE COURT: Can I just clarify, just so I understand
9 precisely what your argument is? You are not seeking to
10 preclude the file names themselves, I take it, just the images?

11 MR. DeCASTRO: Yes, just the images.

12 THE COURT: All right.

13 Mr. Denton, anything you want to say on this score? I
14 think you are probably sensing where I am headed but I think
15 I'm not inclined to preclude you from showing any of the
16 images. Obviously you may buy yourself an affiliate issue on
17 that score if you do, but my inclination would be to permit you
18 but with strict limits on how many, for how long, and how many
19 times, and then we can talk about that in a moment. But,
20 anything you want to say on the broader issues?

21 MR. DENTON: No, your Honor, only to say that I think
22 we have a plan to do just that, which I think in the 403
23 balancing, the prejudicial effect is minimized by the proposal
24 that we have for how we would handle this and so I think to the
25 extent the Court wants to turn to that issue I'm happy to speak

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1 to it, but I think Court is correct about what the appropriate
2 mode of analysis is and what *Old Chief* entitles the government
3 to do in presenting it case.

4 THE COURT: Why don't you turn to that and tell me
5 what your proposal is.

6 MR. DENTON: So, your Honor, Special Agent Spivak has
7 prepared two thumb drives, Government's Exhibits 1001 and 1002,
8 which contain the files from the two different locations on the
9 defendant's desktop that were identified as containing child
10 pornography. 1001 is from the Linux virtual machine, 1002 is
11 from the separate encrypted container called Volume on the
12 desktop. There is approximately 3,000 odd files of what
13 Special Agent Spivak would testify are true child pornography,
14 and then approximately 14,000 files of what he will testify
15 are, what he would identify as child erotica, that is to say --
16 and he will explain this with more professional definition --
17 but photographs of underage children that are almost, but not
18 quite, child pornography. We would propose to offer those
19 thumb drives into evidence so that they are available and part
20 of the record in the case. But otherwise, other than doing
21 exactly what Mr. DeCastro suggested, which is having him talk
22 about file listings and file names and some description of what
23 the files were that he saw, there would only be four files that
24 we propose to display to the jury. Three images and one clip
25 from a much longer video. The first two images have actually

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1 not descriptive file names, they are long strings of letters
2 and numbers that were nevertheless saved within a subfolder on
3 the virtual machine called "11 YR". One of those images is an
4 image of the prepubescent female that Special Agent Spivak
5 would characterize as child erotica, and one of them is a
6 photograph from the same series of the same female that he
7 would identify as child pornography. Part of the point is not
8 just to display the images but to allow Special Agent Spivak to
9 illustrate the distinction that he drew in analyzing materials
10 on the defendant's desktop.

11 With respect to those files, we expect there will also
12 be evidence that that 11 YR folder shows evidence of having
13 been last accessed shortly before midnight on April 30th,
14 2016 -- April 30th into May 1st from the virtual machine, which
15 is during a time period in which Mr. Berger, the government's
16 computer science expert, will testify that there is evidence of
17 the defendant locking and unlocking that virtual machine
18 repeatedly.

19 The video file, which is the third one, also comes
20 from the virtual machine and it is a file entitled, I believe,
21 "Jenny Full." It is a video clip that goes on for quite some
22 time of which the government would propose to play I think
23 approximately seven to 10 seconds from the start of the video,
24 and per the Court's order we have those materials available
25 here today, we can show the Court exactly what we intend. That

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1 video we would plan to use for a couple of different reasons.

2 First of all, Special Agent Spivak would testify that that
3 video comes from what he would identify as a "known series"
4 that the Jenny collection of child pornography is infamous and
5 that it is one of the ways that they identify the age of minors
6 and child pornography comes from whether these files are ones
7 that have previously been identified.

8 Separately, that same file Mr. Berger will testify
9 came from -- or excuse me was identified in a Linux system
10 filed called recentlyused.XPEL which is essentially sort of the
11 book marking feature in Linux that shows recently accessed
12 files in a dropdown menu. So there is forensic artifacts
13 showing that the Josh user of the virtual machine actually
14 played that video using the LC player on the virtual machine on
15 the defendant's desk top.

16 The fourth picture is another image file which comes
17 from the Volume container. Quite simply part of the purpose
18 there is to include an example of child pornography from the
19 other location on the defendant's desktop where child
20 pornography was found. That is a photograph that appears to be
21 actually a collection of screen shots from a video, it is a
22 single image file but it has, I believe, nine images within the
23 same picture, and of particular relevance is that that file
24 comes from a folder that includes the URL from which it was
25 downloaded and also a date created, modified, and accessed, all

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1 coming long after the defendant's move to New York, I believe
2 it was, in December of 2016. And so, as part, the additional
3 relevance beyond simply illustrating the child pornography
4 effect is to include that in the discussion of the defendant's
5 continued use and access of child pornography files after both
6 the transfer of the virtual machine and his move to New York
7 and the storage of those files on a second location on his
8 desktop.

9 So again, your Honor, the sum total we are talking
10 about displaying is three images, and seven to 10 seconds of
11 one video. I expect that we would do that once during Special
12 Agent Spivak's testimony and then would not make further use of
13 it during the trial. They are hard to forget and so I don't
14 think we need to readdress them during jury addresses or other
15 parts of the trial.

16 THE COURT: With respect to the other, I think, close
17 to 17,000 files, you would just have them described by way of
18 Agent Spivak's testimony and a display of the file directories
19 and file names?

20 MR. DENTON: That's correct, your Honor; yes.

21 THE COURT: I can't say that I'm eager, but can I see
22 what you would propose to show the jury, just so we are all on
23 the same page and understand precisely what we are talking
24 about?

25 MR. DENTON: Yes, your Honor. Give us a moment? We

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1 need to do that on a separate laptop pursuant to the Adam Walsh
2 Act, but we have that here and we can do that now.

3 THE COURT: Thank you.

4 MR. DENTON: While we are getting this ready, your
5 Honor, Mr. Lockard makes a good point -- we do not intend to
6 play the video with sound on so we would purely show that clip
7 without any audio attached to it.

8 (Continued next page)

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1 (At side bar)

2 MR. DENTON: So, your Honor, this is the first image
3 which Special Agent Spivak would describe, what he would
4 characterize as child erotica rather than child pornography.
5 This is a photograph from the same series of the same female
6 that he would describe as child pornography. And then just
7 while we are here, this is the third image, which comes from
8 the Volume container.

9 THE COURT: Is that the same person?

10 MR. DENTON: No.

11 THE COURT: OK.

12 MR. DENTON: This comes from a different folder and a
13 different set, this is from the set of files that appears to
14 have been downloaded in December of 2016.

15 THE COURT: OK.

16 MR. DENTON: And then the video, your Honor, what we
17 would propose to do is clip out this title screen from the
18 video and then play from 14 seconds and then play it,
19 approximately, I think from there to there, and just stop
20 there.

21 THE COURT: OK.

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1 (In open court)

2 THE COURT: For the record, I just viewed the three
3 images and the video excerpt with counsel at side bar,
4 including defense counsel.

5 Mr. Denton, anything further you want to add?

6 MR. DENTON: No, your Honor.

7 THE COURT: Mr. DeCastro?

8 MR. DeCASTRO: No, your Honor. Thank you.

9 THE COURT: Well, let me ask you. I think consistent
10 with my remarks before, I will not preclude the government from
11 all display so the question now is just what they're permitted
12 to display and in what manner and for how long. It does strike
13 me that the government's proposal is within the bounds of the
14 *Gonzalez* decision, not that that necessarily is the be-all and
15 end-all of the principles here, but it does seem like a sound
16 balancing of things that are at stake, that is to say, limiting
17 the government to displaying four of the 17,000 images and only
18 briefly only once, and images for which the government at least
19 claims to have evidence of forensic artifacts demonstrating
20 access, and given Mr. Denton's description of their particular
21 relevance, that strikes me as a reasonable balance under 403.
22 But, Mr. DeCastro, do you wish to say anything on that score?

23 MR. DeCASTRO: No. I wouldn't add anything to the
24 record already. Obviously we have made our position that none
25 of them should be shown, but that's it.

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1 THE COURT: All right. Understood. For the reasons I
2 have described, I will permit the government to show those four
3 files, that is to say the three still images and the one video
4 but only that seven-second excerpt, only video, no audio. And
5 I don't know if you can excerpt the seconds that you plan to
6 show to ensure that there is nothing shown before and after and
7 make sure that only that portion is shown. That strikes me as
8 probably the safest way to proceed but, otherwise, I trust that
9 you will set it up in a way that ensures that it is only those
10 seven or so seconds.

11 MR. DENTON: That is what we plan to do, your Honor.
12 We were just awaiting Court's ruling before today before
13 executing on that task.

14 THE COURT: To be clear, consistent with what the
15 government proposes, they'll be shown only once, they'll be
16 shown briefly, that is, for a couple seconds or so each, a few
17 seconds each, and will not be shown during the jury addresses.
18 I think that suffices to address the 403 concerns here and
19 balances with the government's rights to use the evidence to
20 prove the elements of these crimes.

21 That brings me to the second question, which is to say
22 the public's right, if you will, to see evidence admitted at
23 trial. On that score, I am inclined to do what I proposed in
24 my August 18 order, which is to say deny the government's
25 request to conceal the evidence in all respects from the public

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1 gallery but, instead, allow the government to obscure, in the
2 images shown to the public gallery, the individuals' identity,
3 that is to say, blurring the faces or redacting the faces. I
4 will discuss in a moment whether that is doable. I would
5 imagine in 2023 it is, but we can discuss the mechanics of how
6 that would be done in a moment, assuming that that is where I
7 end up.

8 The government's argument in the first instance
9 focused on the harm to the victims by virtue of the fact that
10 they would be identifiable but that harm is substantially
11 mitigated, if not eliminated, by the measures that would
12 prevent any observer from identifying them. I think mitigated
13 is more accurate than eliminated because, as the government
14 argues in its reply, there is some harm to the victims just by
15 virtue of the images of their victimization being shown or
16 knowing that they are visible or shown to people and members of
17 the public. The issue is that on the flipside there is,
18 contrary to the government's argument, indeed, a substantial
19 value in public access, to be clear. That value is not derived
20 from the material itself, the government may well be right that
21 there is no constitutional value in viewing the materials in
22 their own right. Instead, the value is rooted in the fact that
23 this is a criminal trial and in order to convict the defendant,
24 the government is required to prove beyond a reasonable doubt
25 that the material is child pornography and is admitting the

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1 exhibits for that purpose. That is to say, two of the values
2 that the *Waller* Court identified as being furthered by public
3 access to trials are ensuring a fair trial and reminding the
4 prosecutor and judge of their responsibility to the accused and
5 the importance of their functions. I think prohibiting the
6 public from seeing evidence offered by the government to prove
7 an essential element of what are serious crimes is not
8 consistent with those values, whatever value the evidence may
9 have in its own right.

10 The government cites *United States v. Troup*, but that
11 case is from the Northern District of Illinois and over a
12 decade old and, obviously, is not binding on me, nor is it
13 particularly persuasive, in my view, on this point. The
14 government also quotes that case for the proposition that a bar
15 on public access is "the least restrictive alternative," but
16 that portion of the decision pertained to display of
17 pornographic images of the defendant himself so obscuring the
18 identity of the person depicted was not a viable option as it
19 is in these circumstances. For *Troup*, that is at 2012 WL
20 3818242 at page 7, Northern District of Indiana, August 31,
21 2012. I think I said Northern District of Illinois before but
22 I misspoke, it is Indiana. No disrespect intended to either
23 state.

24 The government also cited the Second Circuit's summary
25 order in *Killingbeck*, but that case merely held that the

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1 government's proposal here, basically what the government
2 proposes to do here was not plain error in that case because it
3 didn't prejudice the defendant's substantial rights. The
4 circuit assumed, without deciding, that excluding the public
5 from viewing the exhibits was error, which is not to say that
6 it held it was error, but it is assumed for purposes of that
7 decision that it was error, which is to say it doesn't support
8 the proposition that that is the appropriate course here. See
9 616 F. App'x at page 16.

10 So, for those reasons, I am inclined to do what I
11 proposed to do, and we can discuss how that would be
12 implemented if I adhere to that, but I will give Mr. Denton, if
13 you want, an opportunity to respond. I am happy to hear from
14 you.

15 MR. DENTON: Yes, your Honor.

16 I think the only response I would add would be to
17 propose a slightly more intermediate alternative. I think this
18 is an unusual application of the *Waller* factors because that,
19 obviously, sort of presumes a public right of access in the
20 first place which it does not traditionally obtain with respect
21 to the material that is contraband. So, to go back to our
22 example of drugs on the table, the public would certainly have
23 a right to see that the drugs were introduced but would not
24 have a right to access the drugs themselves, notwithstanding
25 the fact that they were an exhibit in evidence. Here, the

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1 files themselves are obviously --

2 THE COURT: Well, no one is proposing to give them to
3 the public. If there is a request for the exhibits, that
4 request would be denied for precisely the reasons you are
5 describing. The only question is, akin to seeing the drugs on
6 the table, if the public can see what is being displayed to the
7 jury. That, I think, there is a value derived from the fact
8 that we have public trials in this country and the public is
9 entitled to see what the government is presenting to the jury
10 in an effort to convict the defendant of what are serious
11 crimes.

12 So, that's what I understand to be the principle at
13 stake here.

14 MR. DENTON: Yes. Understood, your Honor.

15 So the alternative to a display of the redacted images
16 that we would propose -- and this may have salutary benefits
17 with respect to the record as well -- is to have Special Agent
18 Spivak describe what is being seen. So rather than actually
19 showing the public the images themselves -- we can talk about
20 why that would be a little bit complicated for other reasons --
21 we can have Special Agent Spivak describe it in such a way that
22 it is then in the record, in the transcript for anyone who is
23 not present in court but reviewing, and any members of the
24 public who are present would be able to hear literally what is
25 being shown and being described. That way, again, the

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1 information would be available to the public without making the
2 contraband image, even in redacted form, available to people
3 who are in the gallery.

4 THE COURT: OK. And what are the technical
5 difficulties that you alluded to?

6 MR. DENTON: So I think, your Honor, in order to
7 comply with the Adam Walsh Act, we need to display the child
8 sexual abuse materials on a separate laptop that is not
9 otherwise connected to things that material could be
10 transferred to, basically, just an air gap laptop for that
11 purpose. I think we will have to hook that up to the display
12 system in the courtroom separately. And so, I don't know that
13 we would have a way to hook up two different systems and
14 display two different sets of things at the same time, one set
15 to sort of essentially those before the bar and one set to
16 those behind it.

17 And so, I think given that limitation, what we would
18 really be talking about is exactly what your Honor said is not
19 going to be acceptable, which would be making available a
20 redacted version sometime after the display in court and so I
21 think, like I said, a middle ground we would propose would be
22 to have Special Agent Spivak simply do the description while
23 that is taking place.

24 THE COURT: And why would it not be possible to
25 have -- just talking out loud, thinking out loud here -- but to

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1 have the same laptop have two versions of the images and,
2 frankly, both could be admitted into evidence, one is, say,
3 Government Exhibit 1001, the other 1001A, and briefly show each
4 to the jury and in the case of the redacted or blurred one, the
5 display to the public would also be turned on.

6 MR. DENTON: If I can have a moment, your Honor?
7 Ms. Collins is going to know much better how this works than I
8 do. If I can have a moment to consult with her about this?

9 THE COURT: Sure.

10 (Counsel conferring)

11 MR. DENTON: So, your Honor, I think what you are
12 proposing would be possible with respect to the images, that we
13 could create two different versions, display one I guess sort
14 of the before the bar, and then essentially display it again,
15 in the redacted version, available to everyone in the
16 courtroom. I don't think there is a way to have the system
17 display two different things from the same computer at the same
18 time. With respect to the video, my understanding is that
19 redacting video is a much more complicated endeavor and we
20 might not be able to get that done on the air gap system so
21 that presents sort of a separate technical challenge.

22 THE COURT: All right. Tell you what. Here is my
23 thought. First of all, of the three still images that you
24 showed me, I don't think -- correct me if I am wrong -- that
25 the person is identifiable in the nine composite image

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1 pictures. That is to say, it looked to me like it was a minor
2 but wasn't clear to me that that person would be identifiable.
3 That being said, maybe out of an abundance of caution we could
4 blur or redact the face there. There is no question in my mind
5 that the video is the most disturbing of the four exhibits that
6 you showed me and in that regard I think there is some tension
7 between what I am proposing to do here to ensure the public's
8 right of access with my Rule 403 balancing, that is to say, if
9 we showed that twice, I think it is intentioned with my desire
10 to minimize the display of those exhibits to the jury. I have
11 less of a concern on that front with respect to the still
12 images because, while disturbing, I don't think they're
13 anywhere near the level of disturbing of that video. So what I
14 would propose is doing what I have described with respect to
15 the still pictures, that is to say, having on the same computer
16 two versions and we will show them both briefly to the jury and
17 have the public monitor turned on when the blurred version is
18 shown and show the video only to the jury and have Agent Spivak
19 testify and essentially describe what is being depicted in the
20 excerpt that is shown. Not quite the same as showing it to the
21 public but I also think that, again, recognizing that the two
22 are sort of working in cross-purposes, that might be the right
23 balancing here.

24 Your thoughts?

25 (Counsel conferring)

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1 MR. DENTON: I think we can make that work, your
2 Honor.

3 THE COURT: Mr. DeCastro?

4 MR. DeCASTRO: That's fine, Judge.

5 THE COURT: All right.

6 MR. DENTON: Your Honor, if I may, the only caveat I
7 would say is I assume that is in connection with the Court will
8 give all appropriate and strong instructions to the jury about
9 how they should consider these materials and so on. It may be
10 appropriate to add a sentence explaining why they're being
11 shown them, in two different versions, twice.

12 THE COURT: I'm certainly open to that. Why don't you
13 and Mr. DeCastro confer and if you can come up with proposed
14 language covering all of that, that is to say whatever
15 cautionary language you think I should provide to them when
16 these things are shown, I am certainly open to it. If you can
17 agree on language, all the better, and if there is disagreement
18 I will decide what to do. OK?

19 MR. DENTON: Yes, your Honor.

20 THE COURT: Great. So I think that covers the CSAM
21 issue. There are, I think, three other open items from the
22 motions *in limine*, the next is the so-called alternative
23 perpetrator issue.

24 To the extent that the government was motivated by a
25 concern that the defense might argue that the CSAM was planted

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1 by the CIA or otherwise, that concern seems to be moot, that is
2 to say, it doesn't appear that that is any argument that the
3 defense plans to make. As the defense seems to concede that
4 Mr. Schulte downloaded the CSAM at issue onto his home computer
5 and the only issue is, essentially, whether he ever viewed it,
6 whether he knew what he was downloading, whether he was
7 responsible for putting it on the server from which they were
8 downloaded, on that score it doesn't seem like the defense is
9 proposing an alternative perpetrator defense in the
10 conventional sense but perhaps I am missing something. And, to
11 the extent that it does qualify, I am inclined to think that
12 there is -- that Dr. Kiper's report suffices to prove a nexus,
13 that is to say, I don't think the law requires that the defense
14 has to identify who the person was, but Dr. Kiper's expert
15 report seems to provide some evidentiary basis to argue that
16 these files were put on the server by someone other than
17 Mr. Schulte.

18 Mr. Denton, am I missing something here?

19 MR. DENTON: No, your Honor.

20 I think our point was precisely what your Honor made,
21 which is to the extent the defense was proposing to identify,
22 literally, an alternative perpetrator, whether FBI, CIA
23 whomever planting it or, frankly, any particular other user of
24 the defendant's system, as opposed to simply saying that the
25 government has not proven that it was the defendant, that the

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1 former would be subject to sort of the strictures on
2 identification of an alternative perpetrator whereas the latter
3 would not. It sounds like we are in the latter category and so
4 this may be easy.

5 THE COURT: Am I correct, I take it it is not
6 essential to the government's theory or, for that matter, the
7 element of the offenses to demonstrate that he placed the
8 images on the server from which they were downloaded to his
9 home computer. As I understand it your theory, and the
10 charges, derive from the file's presence on his computer
11 itself. Is that correct?

12 MR. DENTON: Yes, your Honor. I would also say, as a
13 factual matter, we expect to show that Dr. Kiper's conclusion
14 about the server is factually incorrect.

15 THE COURT: That is fine but -- understood. All
16 right.

17 Mr. DeCastro, it sounds like there may be no issue
18 here at all, but anything you want to clarify? Or is my
19 understanding of the defense theory accurate? Correct?

20 MR. DeCASTRO: Yes. I think so, Judge.

21 As to the former issue, the whole planting by a
22 government agency or a particular person, we haven't raised
23 that defense, nor do we intend to. We certainly intend to show
24 access, who potentially had access, those forensic artifacts
25 from both the government and our expert that show that other

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1 people had access, for example, to the server and whether other
2 people had access to the computer. That just becomes an issue
3 of fact for the jury. I don't think -- we are not saying X
4 user but we certainly can point to there are users and that the
5 government has not been able to identify Mr. Schulte sitting at
6 the computer doing X.

7 THE COURT: Understood, and given that I think it
8 sounds like there is no issues in dispute here and the issue is
9 moot, but obviously if something changes or anyone makes an
10 argument that is concerning, you should raise it and we will
11 revisit it.

12 The next item is the so-called unprotected interview
13 statements issue. Per my order from yesterday, the
14 government's motion on that score was granted as unopposed.
15 The defendant's argument was limited to the contention that
16 other statements may be admissible pursuant to the rule of
17 completeness embodied in Rule 106. It is true, as the defense
18 submission noted, that that rule is, on its face, limited to
19 written statements, but Courts have indeed held that it, more
20 than closely related, common law rule of completeness applies
21 to oral statements as well and I note that there is a pending
22 amendment to Rule 106 which, absent Congressional action, will
23 go into effect on December 1 that will make explicit that the
24 rule applies to oral statements. So, I agree that if there is
25 a portion of the defendant's oral statement that should, in

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1 fairness, be considered at the same time as a portion admitted
2 by the government, that it may well be admissible on rule of
3 the completeness grounds. But, the problem is I need to know
4 what we are talking about in order to evaluate whether, in
5 fairness, it would need to be admitted.

6 So, Mr. DeCastro, I don't know if you can at this
7 point identify what you think would be admissible on that
8 principle, but the government has certainly, at least in broad
9 strokes, described the statements it intends to elicit, and if
10 you think that there are any statements that are necessary to
11 add, you should identify them.

12 MR. DeCASTRO: Yes.

13 So, it is a little difficult not knowing exactly what
14 is going to come out of the witness' mouth, of course. We have
15 the primary 302 that identifies what they intend to elicit, and
16 so I think -- so, primarily the issue for us is, as I just
17 mentioned a little bit earlier, is some of the identifying
18 access to the computer itself. So, for example, a portion of
19 his statement, which I understand the government intends to,
20 either in a very limited way or we will see, I suppose, have a
21 witness say that he never shared his password, there was no way
22 anybody accessed that desktop computer. There is a couple
23 issues with that. And then, later on in his statements, he
24 does talk about -- now these other systems we are talking about
25 which is that server that the Court had identified, maybe that

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1 originally the material had been downloaded and then
2 transferred or backed up to the desktop computer. There is a
3 lot of access there and so there are -- we can look at it and
4 say there is lots of people accessing that server and so -- but
5 then there is the statements which I think the government
6 intends to elicit which is that no one else accessed my desktop
7 computer. Now, that might be true physically, but I think
8 there is actual evidence, computer forensic evidence that would
9 say that that is not true, that there were people that were
10 accessing that desktop and that had accessed that desktop.
11 Some of this is a work in progress for us as it is I think for
12 the government. We got some additional material last night
13 from their expert so we are working through a lot of that.

14 THE COURT: Let me stop you.

15 MR. DeCASTRO: Yes.

16 THE COURT: There is a difference between there being
17 forensic evidence that there were people who could or did
18 access the desktop and the issue that we are discussing now,
19 which is whether there are statements that the government would
20 not offer that Mr. Schulte made that you think, in fairness,
21 need to come in given the statements that they do intend to
22 offer. If Mr. Schulte said no one could access my desktop and
23 didn't say anything other than that, then that would certainly
24 be admissible against him. The fact that there may be evidence
25 to the contrary is a different matter but it doesn't implicate

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1 the rule of completeness.

2 MR. DeCASTRO: No, I get it. I only give you that
3 just for some context because later he does talk about people
4 accessing, in his statements to the government, accessing the
5 server part. Now, the part of the statement that I am
6 concerned about -- it just depends on how testimony comes in --
7 is my understanding is he said I don't think anybody had access
8 to the computer, or like that I had shared any passwords. I
9 don't think that I ever shared my encryption passwords with
10 anyone. Thinking is different than what the Court just
11 described. And then there are subsequent statements where the
12 government is asking him about the server, that original server
13 where they do talk about his allowing others to access. And
14 so, those are portions that we may want to elicit from that
15 witness regarding access because he might have been confused
16 between the two computers and that there are so many people
17 accessing with the sort of shared passwords which I think is
18 important for the jury to understand.

19 THE COURT: How do you propose that we proceed here?
20 I mean, one option is that we can see what the government
21 elicits on direct and to the extent that you -- I mean, you
22 know, there is certainly no issue with you on cross saying he
23 didn't say that, you know, no one had access, he said he
24 thought no one had access, right, in clarifying the statement
25 that the government actually elicited. That, I think everybody

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would agree, is totally within bounds of proper cross. The question is whether you intend to go beyond that and try to introduce a statement that he made that the government didn't touch on at all. I suppose one option, if you propose to do it only through cross, is to the extent that after hearing the direct you think there are such statements, you can flag them to the government and if there is any objection I will take it up at that time. Does that make sense.

MR. DeCASTRO: Yes, that's fine. That's totally fine. As we get closer, anyway, I could probably do it the first day and say, look, I intend to go maybe in this direction from this statement, and if they have an objection we can just deal with it at a break.

THE COURT: The other option is to have the government identify -- and perhaps it would be willing to do so, either informally to you or more formally by way of a proffer to me -- precisely what statements or portions of Mr. Schulte's statements it intends to elicit.

Mr. Denton, do you have any thoughts on the best way to handle this?

MR. DENTON: Your Honor, two things.

First, I think we can handle this informally. I think we have largely identified it, I think we are happy to continue having conversation with Mr. DeCastro. It also sounds like some of this may be a little bit unknowable until Evanchec says

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1 exactly what he is going to say on the stand. I would note,
2 however, that I think there is a difference between the
3 requirement of the rule of completeness of contextualizing a
4 statement that is offered, i.e., the defendant's statements
5 about the desktop, with other statements that the defense
6 considers to be helpful, i.e., his statements on an entirely
7 different topic like who had access to a computer.

8 So it is not entirely clear to me that we are in rule
9 of completeness-land with respect statements that Mr. DeCastro
10 is identifying. We are happy to, again, continue a dialogue
11 here, but I think that is an important distinction that we will
12 continue to try and emphasize.

13 THE COURT: All right.

14 MR. DeCASTRO: I am happy to have the dialogue. On
15 the last point, this is an interview where they are talking to
16 him about a million different computers that they have seized
17 and recovered and they're talking about the particular two that
18 I am talking about, really, back to back. So I guess it does
19 depend on how the agent testifies and I suppose we will just
20 communicate on, if there is a friction point, we will just
21 raise it to the Court, if that works.

22 THE COURT: So I would encourage you to have a
23 thorough conversation on this front and an ongoing dialogue. I
24 mean, other things, I think it makes sense for both sides --
25 and if Mr. DeCastro can actually identify portions of the

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1 statement that are appropriate to offer on rule of completeness
2 grounds or underlying principles -- it may behoove the
3 government to elicit it itself as part of the direct. So I
4 think a lot of this can be worked out in advance, and to the
5 extent that after hearing the direct, Mr. DeCastro, you
6 identify statements that you would seek to elicit, I think you
7 need to identify those so that we can discuss them with
8 particularity and see if there are any issues. All right?

9 MR. DeCASTRO: Yes.

10 MR. DENTON: Yes, your Honor.

11 MR. DeCASTRO: Yes.

12 THE COURT: Great.

13 The last motion *in limine* item is the other remaining
14 issues regarding Dr. Kiper. I assume, Mr. DeCastro, I think
15 Mr. Denton made clear that he thought I was correct in my
16 assumption that I articulated in my order yesterday, but my
17 take is that the government's letter of last Friday mooted that
18 portion of the dispute concerning the witness' interpretation
19 of the IRC chats and the Google searches. That is to say,
20 given that the government doesn't intend to offer those at all,
21 any testimony about the meaning of those is obviously, I would
22 think, moot.

23 Do you agree with that?

24 MR. DeCASTRO: I think that's right. What I am
25 pausing about is whether I would -- one second, Judge?

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1 (Counsel conferring)

2 MR. DeCASTRO: I do, Judge, yes.

3 THE COURT: I think that leaves two other disputes
4 regarding Dr. Kiper. First, whether and to what extent he can
5 opine on Mr. Schulte's mental state. To cut to the chase, I
6 agree with the government, he cannot. Parenthetically, the
7 defense makes some argument to the effect that mental state,
8 when transferring the files, is not an element of the crime. I
9 don't understand that. It is indeed an element of all three
10 crimes with which Mr. Schulte is charged, that is to say, the
11 government has to prove that he knowingly engaged in the
12 conduct. At the same time, Dr. Kiper can, assuming a proper
13 foundation is laid, certainly testify to objective facts that
14 he obtained in connection with his forensic review of evidence.
15 What inferences should be drawn from those facts is an issue to
16 be argued by the parties and for the jury to draw itself, thus
17 I do agree that references in the report to what Mr. Schulte
18 knew or what he was aware of, that he inadvertently did X or Y,
19 are problematic and I would not permit Dr. Kiper to testify
20 consistent with that.

21 Ultimately, though, I think this needs to be policed
22 at trial. That is to say, Mr. DeCastro, I trust that you will
23 try to adhere to the line that I just drew and be careful, but
24 to the extent that you ask a question, or Dr. Kiper says
25 anything that goes across that line and opines on Mr. Schulte's

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1 mental state, I trust that the government will object and I
2 will deal with it through rulings on objections.

3 Make sense?

4 MR. DENTON: Yes, your Honor.

5 MR. DeCASTRO: It does, but just to be clear, I just
6 want to be clear in preparing him. I mean, certainly he can
7 testify, if I am hearing the Court correctly, about facts that
8 would be indicative of knowing or knowledge or of those things
9 and he has experience, he has been building cases on the other
10 side of the table for most of his career, and so what do they,
11 as forensic examiners, look for to show knowledge. And then he
12 just can't say whether --

13 THE COURT: To be clear, I think he can say what
14 forensic examiners look for to prove knowledge, what kind of
15 forensic artifacts demonstrate or can demonstrate knowledge,
16 and he can testify that based on his analysis those artifacts
17 are not present in this case. I think he can do all of that.
18 What I don't think he can do is then say, therefore, I conclude
19 that Mr. Schulte didn't know that this is child pornography.
20 That is an argument that you can make to the jury but that
21 question is ultimately one for the jury, not for the expert to
22 opine on.

23 MR. DeCASTRO: Understood.

24 THE COURT: OK.

25 MR. DENTON: Apologies, your Honor, but just one

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1 clarification on that. I think, by and large, we agree with
2 the characterization about, sort of, he can testify about what
3 kinds of things forensic examiners look for. I think there was
4 an element of his report -- and maybe this is where your Honor
5 is going that goes beyond that that talks about --

6 THE COURT: It is.

7 MR. DENTON: OK. We will go there then, your Honor.

8 THE COURT: I think the closer question is precisely
9 what I think you were about to get to, which is whether and to
10 what extent Dr. Kiper can opine on typical child pornographers.
11 Is that where you were going?

12 MR. DENTON: Yes, your Honor.

13 THE COURT: I guess the question I have for you,
14 Mr. Denton, is how that proposed testimony differs from
15 testimony that the government offers all the time about, for
16 instance, red flags that investigators typically see in money
17 laundering transactions with drug traffickers and the like.
18 That is to say, I think the government often puts on an expert
19 to say these are the kind of red flags or hallmarks of a drug
20 trafficking operation and then presents evidence that, lo and
21 behold, those hallmarks are present in this particular case.
22 Here, I understand Mr. DeCastro to be proposing to do something
23 similar which is to say, based on Dr. Kiper's lengthy
24 experience -- and it doesn't sound like there is any dispute
25 about his qualifications and experience -- that he identifies

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1 what sort of hallmarks, if you will, of most if not all of the
2 child pornographers he experienced in his career, and then
3 testifies that he didn't see evidence of those here. I would
4 think there is plenty of fodder for cross-examination on that
5 score; number one, child pornographers don't need to adhere to
6 the typical traits or what have you, that's not an element of
7 the crime. And I'm happy to give appropriate cautionary
8 instructions if the government thinks there are cautionary
9 instructions to give, but it does strike me that it is not
10 necessarily improper to offer testimony on that score to
11 contextualize it and make clear the significance of what
12 Dr. Kiper did or did not find in his forensic examination.

13 What am I missing there?

14 MR. DENTON: I think three things, your Honor.

15 First, I think there is an issue on which we have a
16 question about Dr. Kiper's qualifications. Dr. Kiper was a
17 CART examiner for many years, he was not an investigating
18 agent. It is not clear to us that he has testified about this
19 before or that he has any particular experience with child
20 pornography cases and so he certainly is not a behavioral
21 analyst or psychologist or anyone that can testify about what
22 would be typical behavior of a person who commits a particular
23 type of crime. So it is not clear to me that he has expertise
24 in that regard.

25 The second deals with sort of the sufficiency -- I

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1 guess not sufficiency but specificity of the notice. It is not
2 clear to me what he means as child pornographer, or what we are
3 using as the baseline of typical here in the sense that there
4 are a lot of different permutations of this and between people
5 who distribute child pornography, child pornographers who are
6 producers of it, other types of different activity in this
7 area, it is not really clear to us that he has been specific
8 about what the basis for his knowledge is as uniquely relevant
9 here.

10 And then I think the third point is just a more
11 general 403 point. If Dr. Kiper testifies about that, we are
12 going to put Special Agent Spivak back on in rebuttal to
13 testify that as an actual expert in child pornography cases,
14 the evidence in this case is entirely typical. And at that
15 point we are not really providing testimony that is helpful to
16 the jury either within the sense of the expert rules or
17 Rule 403, we are simply having two different agents say, well,
18 I used to see this and now I see that. And that's not helpful
19 to the jury as opposed to what evidence is present in this case
20 and the arguments that are to be made from that.

21 So I think those are the ways in which this is
22 distinct from, perhaps, a more arcane form of criminal
23 transaction that requires expert explanation to the jury from
24 someone with actual experience as an investigator of those
25 types of crimes.

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1 THE COURT: Number one, there was no *Daubert* motion
2 here to include Dr. Kiper on the grounds of his qualifications
3 or lack thereof, so I think that ship has sailed and there is
4 no argument made in your motion *in limine* to preclude him on
5 that ground. Obviously, that is fodder for cross-examination
6 if you think that his experience is limited and/or you know he
7 is -- well, if you think it is limited then you can cross him
8 on that.

9 Mr. DeCastro, do you wish to respond to any of this?
10 Some of it may depend on what -- I sort of agree that unless we
11 have a definition of what a "typical child pornographer" is,
12 that that might be problematic. On the other hand, I can
13 imagine if the testimony is I worked thousands and thousands of
14 child pornographer cases in my experience with the FBI and in
15 every case there are certain things that I saw, namely like
16 thousands of files repeatedly accessed, etc., etc. I mean, I
17 think that -- well, anyway, what do you have to say?

18 MR. DeCASTRO: I think Dr. Kiper is experienced enough
19 to be able to identify the hallmarks of, for lack of a better
20 term, the typical child pornographer, possessor, or
21 distributor, or creator. Those kinds of things. I know this
22 relates a little to his training. He was a trainer of the
23 trainers in CART.

24 THE COURT: What is CART?

25 MR. DeCASTRO: CART is the -- what does it stand for?

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1 MR. DENTON: Computer Analysis Response Team.

2 MR. DeCASTRO: It is all the computer techs that
3 essentially analyze all the devices and they analyzed all the
4 devices in this case. He was a trainer of trainers so he was a
5 line agent for a period of time but he was a trainer of
6 trainers. And on that point, I think he can describe what you
7 look for. Now, it doesn't prohibit the government from saying
8 not everybody is the same. This is the same as in drug cases.
9 The typical drug crew does blah-blah-blah and we are showing
10 you, Jury, this is the kind of hallmarks of a drug distribution
11 network. The defense tries to point out that there aren't or
12 that it is different and the government is free to argue that.
13 And then, the point that Mr. Denton just made is yes, they're
14 free to call their expert back on rebuttal to say what is wrong
15 with Dr. Kiper's analysis and/or conclusions with respect to
16 those hallmarks. Maybe their investigator can say times have
17 changed. I don't know. I guess that we have to sort of see
18 what happens during the course of trial, but I don't see how he
19 should be prohibited from testifying as to those general
20 hallmarks that you look for as an investigator.

21 THE COURT: Mr. Denton?

22 MR. DENTON: I think, your Honor, we come back to sort
23 of where I ended which is the question fundamentally is, is
24 this helpful to the jury? And it is not clear that there has
25 been any sort of explanation about why this is a unique type of

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1 investigation or unique type of crime that warrants expert
2 testimony from two different experts on what is typical
3 behavior or not, or why typical behavior is relevant.

4 Dr. Kiper is more than free, as everyone has agreed, to opine
5 on what he found or didn't find and what conclusions he drew
6 from that, but he is not allowed to opine that, well, the
7 absence of certain evidence indicates the absence of a crime
8 any more than you can have an expert testify in a murder case
9 as a homicide detective that most people are killed by people
10 they know. At a certain point there is a difference between
11 testimony about the generalities of how crime is committed and
12 the sort of expert testimony that the Court has referred to,
13 which both district courts and the Court of Appeals have
14 policed more stringently so recently with respect to whether it
15 is truly helpful to the jury to have someone talk about sort of
16 typical criminal behavior as opposed to the evidence in this
17 case. We think that rather than having dueling experts talk
18 about what is typical, the jury is far better served by expert
19 testimony about the evidence in this case.

20 MR. DeCASTRO: Judge, it seems we have this fight when
21 the conduct is atypical. When it is typical, the government
22 moves to put it in all the time and the witnesses say what is
23 typical of the drug crews. Or what is typical of this is, for
24 example, let's just talk about CSAM. I would think that if
25 there was evidence of him accessing it every single day, they

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1 would want to put that in and say that is typical of someone
2 who collects and categorizes and views it.

3 THE COURT: Right, but I think I guess what Mr. Denton
4 would say on that score is that is evidence that is probative
5 of the defendant's actual conduct in the case and then,
6 therefore, may be helpful to the jury in understanding and
7 contextualizing that conduct. The fact that some other person
8 commits a crime in a different way isn't necessarily probative
9 of the fact that the defendant committed a crime. In other
10 words, it may be that most child pornographers -- I'm not
11 expert on this -- but it may be that most child pornographers
12 download thousands and thousands of images and view them in an
13 obsessive way, but the fact that somebody downloaded only 10
14 images and only looked at them once doesn't make that person
15 innocent of the crime.

16 MR. DeCASTRO: And the witness isn't opining on
17 innocence or not. What they are saying is what they typically
18 see in their experience. None of us are experts in
19 investigating -- well, you know, these cases every single day,
20 and if there are standards in their industry of forensic
21 analysis and the things they look for and the absence of which
22 might indicate that -- not that the person can opine on it that
23 something was inadvertent, for example, well, the witness
24 should be allowed to say not the inadvertent conclusion of
25 things but that this is what I typically have seen in my

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experience. That's what experts are for. I think the jury certainly would -- I think it is useful for the jury to understand. They're going to have a tech expert testify for a whole day about all the computer systems and how everything is set up and how the things are organized, these files organized where they are. Is that typical or atypical? I don't think it becomes a side show fight, I think it becomes a few pieces of testimony that both witnesses can testify about and we can argue it before a jury.

THE COURT: I think I need to think about this. My inclination is to allow some latitude here but rule on objections as they come, which is to say I think descriptions of the typical child pornographer are probably problematic for the reasons that Mr. Denton articulated, but some testimony saying, from his experience, the kinds of evidence that investigators look for as evidence to demonstrate defendants' knowledge that they accessed, that they viewed it, the kind of artifacts that they look for and often find in cases involving child pornography, and then testimony that those artifacts are not present here, I think that strikes me as permissible. But, the devil may be in the details and I probably need to police the line through objections.

Is that sufficient for now?

MR. DENTON: Yes, your Honor.

I think I would just note, with respect to sort of the

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1 amended expert rule and the requirement that the government
2 give notice of expert testimony that it would offer to rebut a
3 defense expert, we certainly would intend to call Special Agent
4 Spivak to testify to some amount of contrary conclusion.
5 That's a little bit difficult to define with specificity
6 pending sort of the Court's ruling and how it plays out. I
7 think we are happy to give whatever level of notice is
8 necessary to uncover the ground there by whatever time the
9 Court thinks is necessary to sort of address that. So, I think
10 that's one ministerial point.

11 I think there is one other issue that is a little bit
12 larger and potentially more problematic that some of this could
13 raise which is that Dr. Kiper makes a great deal out of the
14 defendant's not accessing the Linux Mint Virtual machine after
15 May 1st of 2016. Dr. Kiper may not be aware of the large body
16 of other evidence that was introduced at the last trial about
17 what the defendant was doing on May 1st, 2016 and why he
18 stopped using that virtual machine. The government has no
19 intention of going down the road of the espionage evidence at
20 this trial but to the extent that Dr. Kiper goes down the road
21 of saying that no one who was really into child pornography
22 would stop using the place where they had collected it, I think
23 we would very likely need to introduce evidence that showed why
24 he stopped using it, which would mean evidence about the
25 transmission of the Wikileaks and the use of the virtual

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1 machine for that purpose at that time.

2 THE COURT: And connect those two things for me, which
3 is to say perhaps refresh my recollection of what the
4 significance of May 1st is. I think that is the evidence that
5 he wiped the -- well, anyway.

6 MR. DENTON: Yes, your Honor.

7 So there was the evidence with respect to the
8 transmission to WikiLeaks during that kind of April 30th, May 1
9 window that Mr. Berger testified about at some length at the
10 last trial. We do not intend to have him testify about any of
11 that on his direct case this time. He will testify about the
12 reformatting of the defendant's computer purely as a fact that
13 happened and what effect that had on his ability to conduct
14 forensic analysis and not any of the explanations as to why
15 that happened and when it did, nor will he get info sort of the
16 use of tails or other evidence that was introduced at the last
17 trial around that time.

18 However, to the extent that Dr. Kiper intends to use
19 the cessation of use of the virtual machine and the evidence of
20 what happened with the reformatting, copying, all that, to say,
21 well, the only explanation for this is that this belonged to
22 somebody else because no one who was really into child
23 pornography would stop using their child pornography virtual
24 machine in this way, I think we would need to meet that
25 conclusion with evidence of why the defendant did what he did.

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1 So we do not plan to open that door. Mr. Berger is going to
2 stay far away from it. If Dr. Kiper opens it, though, I think
3 we are not going to have a choice but to meet his conclusion.

4 THE COURT: All right.

5 MR. DeCASTRO: A couple points.

6 I don't follow a hundred percent because, in terms of
7 virtual machines there is like thousands of them in this, in
8 all of this computer evidence, it is not just one virtual
9 machine and I don't understand that the virtual machine we are
10 talking about in this case relates, has any WikiLeaks
11 connection. So I don't know how we would be opening a door by
12 identifying that from -- it is just identifying fact. And the
13 government made mention of it earlier that they intend to be
14 eliciting fact of additional usage, just in a different place,
15 so I don't really know where -- I am not following what door we
16 are opening.

17 THE COURT: Tell you what, because I think the devil
18 may be in the details here, I think you guys should have a
19 conversation about this and it may be that -- well, it may be
20 that you are on different pages and in which case we can
21 revisit this. It may be that there is something Mr. DeCastro
22 doesn't understand or know or not appreciating a connection the
23 government might draw here. I think it is certainly fair for
24 him to understand what the line is here, that is to say that
25 how he would be opening a door if in fact it would be opening a

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1 door to something that would be potentially quite significant.
2 So, I think everybody should understand what's at stake here
3 and the government's position on what would open that door, and
4 if Mr. DeCastro disagrees about whether that would open the
5 door and wants to go there, then we can revisit it. If
6 Mr. DeCastro agrees it would open the door and decides not to
7 go there, then we don't need to revisit it, presumably it would
8 be a moot point, or if he wants to take his chances and see how
9 I rule we can see where he goes and then he can take his
10 chances. But getting into the WikiLeaks transmission issue and
11 the espionage charges and the like, strikes me as a very
12 significant issue that we should all be on the same page about
13 well before it happening.

14 MR. DENTON: We will have a detailed conversation and
15 make sure we all know what we are talking about, your Honor.

16 THE COURT: And I trust that one or both of you will
17 raise it with me again if there is any need for further
18 discussion.

19 MR. DENTON: Yes, your Honor.

20 THE COURT: All right.

21 MR. DeCASTRO: Will do.

22 THE COURT: That actually brings me to one additional
23 issue which is not -- well, I suppose it is touched upon in the
24 motions *in limine* given the government's motion which was
25 granted as unopposed to exclude any mention of the CIA. I just

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1 want to make sure we are all on the same page on that score.

2 There is the one issue that we just discussed that you
3 will have further discussions on and we can revisit, as needed,
4 but we are more broadly, I take it that the government doesn't
5 plan to, or let me ask you how you plan to deal for, in a
6 sense, the search warrant and search of the computers. Is it
7 your plan to say there was a search warrant obtained and the
8 search warrant was executed and not really describe the
9 underlying circumstances or reasons for that? And then the
10 other area that I thought might warrant discussion, and maybe
11 there are others, was the testimony about Mr. Schulte's
12 statements. My understanding is -- and this is based in part
13 on the government's own motion *in limine* -- that some of those
14 statements that the government proposes to offer concern his
15 prior employment at the NSA and at the CIA and I want to just
16 make sure we are all on the same page with respect to how the
17 government plans to elicit that because I don't want -- the
18 government moved and I granted the motion to exclude any
19 mention of the CIA and his prior connections at the same time
20 eliciting those statements in a manner that leaves the jury
21 guessing as to what is going on, and suspicious, might be
22 problematic as well. So, I want to just discuss that.

23 MR. DENTON: So, your Honor, we intend to stay away
24 from it completely. I think with respect to the search warrant
25 and the investigation, we will just accept the cost of starting

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1 *in media res* on that with the execution of the search warrant
2 and I think everyone will testify to their participation in an
3 investigation of the defendant and leave it at that and not get
4 into to what, or what squad they work for, or what kind of
5 investigation it was.

6 With respect to his statements and prior employment,
7 we do not intend to elicit anything about the CIA or NSA,
8 simply the fact that he was employed as a computer programmer,
9 that he was familiar with Linux and these other programs, that
10 he now worked in an IT computer job here in New York, and who
11 in particular he worked for I don't think we think is relevant
12 and we can potentially, as I said, kind of leave that out
13 entirely.

14 THE COURT: Mr. DeCastro, does that all make sense to
15 you?

16 MR. DeCASTRO: Yes, Judge. I mean, as you say, we
17 didn't, on the motions *in limine* when they moved to preclude
18 that piece, we didn't oppose any mentions and my understanding,
19 in talking to the government anyway before at different dates,
20 that they did not intend to elicit his place of employment so
21 we are fine with that.

22 THE COURT: That's my understanding as well but I just
23 want to make sure that what Mr. Denton is proposing to do, that
24 is to say start *in media res*, that is to say that there is a
25 search warrant that was obtained and jumped directly to the

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1 search and just directly to what was found without discussing
2 any of the context or background and elicit that he worked as a
3 computer programmer in or around the Virginia area and then
4 moved to New York where he worked as a programmer without
5 describing the nature of his employment, that that was OK with
6 you.

7 MR. DeCASTRO: Yes. That is what we understood they
8 were doing.

9 THE COURT: Great. All right. So that covers the
10 legal-type issues that I thought we needed to discuss today. I
11 did briefly look at your respective requests to charge and the
12 government's response to the defense requests to charge at
13 ECF 1091. I didn't see any big picture issues that we need to
14 address before trial. There are obviously some issues that we
15 will need to address at or before the charge conference but
16 there doesn't seem to be anything we need to discuss
17 today, but let me know if you disagree. And, more broadly, as
18 you know, I would like you guys to make sure that you are
19 trying to identify any issues that might come up during trial
20 that I do need to address or should address, and bringing those
21 to my attention sooner rather than later. What I want to avoid
22 is the need for side bars. I think everybody understands that
23 I don't like side bars and try to keep them to an absolute
24 minimum, so it is incumbent upon you to identify issues that
25 warrant discussion before they come up so that we can address

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1 them outside the presence of the jury either before they come
2 in in the morning or at the conclusion of the day.

3 So that's the broad point to make here but, more
4 specifically, are there any other issues that you think we
5 ought to address now? And, in particular, obviously, if there
6 might be anything that would affect your opening that you might
7 want or need pretrial rulings on, this is the moment to ask.

8 Mr. Denton.

9 MR. DENTON: So, a couple of small things, your Honor.

10 First, with respect to the request to charge, just to
11 flag one small thing that we did not make a submission on. To
12 the extent that we put into evidence the two thumb drives
13 containing the child pornography, that's not something that we
14 will be able to send back to the jury so we would need an
15 appropriate instruction on that point.

16 Second, we are talking about Counts 12, 13 and 14 of a
17 long indictment here. We think it would be appropriate to
18 produce a redacted or altered indictment that simply renumbers
19 them as 1, 2, and 3. We are happy to prepare that or otherwise
20 do that in whatever way the Court thinks best here.

21 THE COURT: Number one, not committing to the notion
22 that the indictment will go to the jury, the charges here
23 aren't especially complicated and it may not even be necessary,
24 but I think you should prepare a trial indictment just in case,
25 that is to say take Counts 12, 13, 14 -- whatever they are --

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1 and just make them three counts, Counts, One, Two and Three,
2 and for purposes of trial I plan to renumber them in that
3 manner to avoid any prejudice to the defendant. So I guess
4 that's consistent with what you are proposing but I am not yet
5 convinced that the indictment needs to go to the jury since it
6 is not evidence and they will be told what the nature of the
7 charges is in the instructions. All right?

8 MR. DENTON: That's fine, your Honor. We will have it
9 ready to go and that way the Court can decide.

10 THE COURT: Yes.

11 I'm not going to send the thumb drives in with the
12 jury given that they are contraband. I think one issue you
13 might want to look to and give some thought to, just out of an
14 abundance of caution -- my hope is this issue doesn't arise --
15 but what happens if the jury, during its deliberations, says we
16 want to see other files that are on the thumb drives that were
17 admitted that is beyond the four that I have allowed the
18 government to show. What happens then? Do I say to the jury,
19 sorry, we are only showing you those four and otherwise you
20 need to accept the testimony describing the rest, or given that
21 they are in evidence are they entitled to see them. My hope is
22 that that scenario doesn't arise but I think it might pay to
23 spend a little time in advance looking into it just in case, so
24 we are prepared in the event that it does.

25 MR. DENTON: That is our hope as well, your Honor.

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I think, based on what we have found so far, they would be entitled to see material that is in evidence but that would have to be something we kind of bring the jury out and show them in the same way that we would show them other contraband. I'm not sure what that means in terms of the Court's ruling on the *Waller* issue. I think we might need to figure out some way to do something for the public then but we haven't gotten there yet so we will give that some thought.

THE COURT: Just flagging that to put a pin in it.

Mr. DeCastro, anything you want to say on the two issues that Mr. Denton raised?

MR. DeCASTRO: No, Judge.

THE COURT: Do you have any other issues that you think we ought to address today?

MR. DeCASTRO: We have nothing new.

THE COURT: All right.

MR. DENTON: One final thing.

THE COURT: Yes.

MR. DENTON: We raised this with defense counsel last week. We understand they are still planning to call Dr. Kiper. We have not gotten any 26.2 material or exhibits for Dr. Kiper other than the expert notice that we received. There have been some proffers at points of things that he might say that are not reflected in the expert notice like other people having access not just to the server but to the desktop, in fact. So

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1 we do not anticipate this being a long trial at this point, and
2 particularly if we are able to reach a stipulation I think the
3 government's case would be no more than two full trial days of
4 testimony, so we would ask that anything that the defense is
5 going to produce on that score we get by Friday so that we are
6 not trying to digest it in the middle of a quick trial.

7 MR. DeCASTRO: We don't have any issue with that. I
8 think the reasoning behind that is we haven't had access to our
9 client, that's been a little bit hard, and no issue with the
10 government providing us additional exhibits as they get them
11 ready, so it just changes a little bit. So, they'll certainly
12 get the material. We have to make that decision, whether we
13 are still calling Dr. Kiper, and of course we will provide the
14 material to them. Friday is fine with me.

15 THE COURT: Great. So do it by Friday.

16 I was about to turn to disclosure issues and timing.
17 One note on that score, just to circle back, I think that the
18 Rule 16 to which Mr. Denton alluded earlier, I think that that
19 deadline and the disclosure requirements are specific to any
20 experts that the government would call in its case-in-chief,
21 which is to say I'm not sure that that rule or the recent
22 amendment applies to a rebuttal expert, but obviously I should
23 look into what notice, if any, you need to provide of any
24 potential rebuttal expert and to the extent that you propose to
25 call one, make sure you do what you need to do. I just want to

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1 flag that.

2 On the disclosure front, Mr. Denton, can you tell me
3 3500 exhibits, when you plan to give those to me? Whether and
4 when you have given them or plan to give them to Mr. DeCastro?
5 As you know, I like them in electronic form, I assume you can
6 do that through USAfx, and to be clear, obviously we are not
7 talking about the child pornography exhibits, those you don't
8 need to provide at all but the rest of them, tell me what the
9 situation is.

10 MR. DENTON: So, your Honor, we produced the vast
11 majority of the exhibits including the actual forensic
12 exhibits -- I forget when the actual deadline was the Court
13 set -- but two, three weeks ago now. We have continued to
14 produce some things that are either sort of works in progress
15 like the presentations for the government's two experts, which
16 we have marked as exhibits, we continue to produce sort of
17 revised versions of those as they're prepared; ditto with
18 respect to 3500, we have produced that material and are
19 continuing to produce new 3500 as it is ready. We are happy to
20 give all of that to the Court whenever the Court would like.
21 We had hoped to provide sort of the most complete set possible,
22 so whenever Court would like it, we can arrange that.

23 THE COURT: I think it would make sense to make it the
24 most complete set possible, which is to say easier to do it in
25 one fell swoop than add things piecemeal. So, Friday or even

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1 Monday morning would work, as long as we have a plan, but does
2 Friday make sense?

3 MR. DENTON: I think that makes sense, your Honor. I
4 am sure anything we add over the weekend would be minimal.

5 THE COURT: Why don't you communicate with my chambers
6 to make sure that we have a plan to get that. And,
7 Mr. DeCastro, same on your end, any defense exhibits, Rule 26.2
8 materials, can you get those to me by Friday?

9 MR. DeCASTRO: Sure.

10 THE COURT: All right. Very good. And also
11 electronic. We have a means to submit things by file transfer
12 protocol if it is voluminous and that makes sense. Otherwise,
13 if they're small enough, you might be able to just e-mail them
14 to us.

15 MR. DeCASTRO: OK.

16 THE COURT: Very good.

17 Just a reminder that under my Rules you are required
18 to submit word versions of your respective exhibit lists by
19 Monday morning is fine on that score, but just make sure that
20 you look at my rules and comply with them.

21 Mr. DeCastro, I don't know -- and I know you were
22 talking to Mr. Schulte and he was reviewing things at the
23 outset of this, but are you in position to say whether you
24 think you will agree to the proposed stipulation, that is to
25 say I am trying to get a sense of --

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1 MR. DeCASTRO: I am going to review it with him right
2 after this proceeding over in 500, so I can let the Court know
3 by the end of the day.

4 THE COURT: OK. That would be helpful, since it
5 sounds like it has some bearing on the length of trial.

6 MR. DeCASTRO: Yes.

7 THE COURT: Just so I understand, though, Mr. Denton,
8 you said earlier that that would obviate the need to call four
9 witnesses but I take it those witnesses wouldn't be especially
10 long regardless, or am I making an incorrect assumption on that
11 score?

12 MR. DENTON: No, your Honor. I think two of the
13 witnesses would be pretty brief, they would be sort of the
14 seizing witnesses. The other two witnesses are the imaging
15 witnesses, sort of the Dr. Kipers, if you will, who made the
16 extractions, and then Mr. Berger and Mr. Spivak will testify
17 about the content of their analysis. That may take a little
18 longer if we have to explain the process of how that goes. I
19 still don't think that they're going to be particularly long,
20 but obviously given the time it takes to get people back and
21 forth, four witnesses would have a not immaterial effect on the
22 length of the trial.

23 THE COURT: And Mr. DeCastro, I'm not going to hold
24 you to it, but at this time are you in position to say whether
25 you would anticipate presenting a defense case of one sort or

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1 another? Do you have any sense or do you not want to say? It
2 would just be helpful in terms of knowing how long trial is
3 likely to last and what I should tell the prospective jurors.

4 MR. DeCASTRO: Understood. On the defense case we are
5 certainly considering, at this moment, calling Dr. Kiper, and
6 then I don't know after that.

7 THE COURT: All right. Very good. Per my order
8 yesterday, just a reminder that you should, by the end of
9 today, submit a list to us, in Microsoft Word format, of names
10 and places likely to come up during trial, just for my
11 inclusion in jury selection process. I would actually add to
12 that if you can include any and all names of anyone on your
13 trial teams, who you expect to be in the courtroom at any time
14 during trial so I can have the proper spellings and have a
15 comprehensive list on that score, that would be helpful. So,
16 lawyers, agents paralegals or assistants, anyone who will be
17 assisting, you should include their names.

18 Let's talk about jury selection. You should be here
19 by 9:30 a.m. on Monday and we will get going as soon as we have
20 a prospective jury. It will probably be a little later than
21 that but I don't want to make them wait. We will get going as
22 soon as we can and we may have some final things to address on
23 Monday before we have them in any event.

24 I do intend to pick the jury on Monday and you should
25 be prepared, therefore, to open. The government should be

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1 prepared to call its first witness or witnesses. The bottom
2 line is we will get done as much as we can that day. It would
3 surprise me if we had a jury before lunch. I suspect
4 mid-afternoon might make more sense but, in any event, you
5 should be prepared to proceed with not just openings but first
6 witnesses.

7 I do intend to pick 14 jurors, that is to say 12 and
8 two alternates. Given the length of this case I don't think we
9 need to do more than that, though if you disagree you can let
10 me know. As you know, I will conduct all voir dire. I will
11 take into consideration your requests on that score and include
12 them as I see appropriate. I did have a couple questions I
13 wanted to pose to you, though. The first is neither of you
14 propose that I include any reference or inquiry regarding the
15 CIA, or more to the point, I think the government said only if
16 that motion was granted, which it has been. So, one option is
17 to make no mention of the CIA at all. Another option, I guess
18 the question is, is there any concern with someone who
19 previously worked at the CIA? They will obviously be asked if
20 they know Mr. Schulte, if they have heard of Mr. Schulte and so
21 forth and that may be sufficient to cover any issues here, but
22 would you want to know if somebody had any previous employment,
23 friends or close friends who worked at the CIA and, if so,
24 should I throw them into the list that I would ask about law
25 enforcement agencies? I can just say law enforcement and

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1 intelligence agencies and reference the FBI, CIA and the like
2 without explaining the reasons. I'm open to doing either. The
3 cleaner way would be obviously not any mention but, on the
4 other hand, if you think it is worthwhile or necessary to know
5 if somebody has a unique connection to the CIA, then it might
6 pay to include it in some slightly sanitized version.

7 Your thoughts?

8 MR. DENTON: I think, your Honor, we think the cleaner
9 version is appropriate, especially given that anyone who knows
10 the defendant is certainly going to know why and say it. I
11 think otherwise it is more likely to, even in the sanitized
12 form, stick out a little bit and potentially cause some odd
13 reactions.

14 MR. DeCASTRO: I think we want to know if someone has
15 connection and I think you can include it with sort of a list
16 of law enforcement which I don't think would -- I don't think
17 it would stick out too much. You can say something like the
18 Court just said, intelligence agencies like the CIA, NSA,
19 things like that and see if anybody responds. I think that
20 would be helpful to know because, certainly from our
21 perspective, of course, anybody who has a connection to the
22 CIA, worked at the CIA, is arguably going to know who Joshua
23 Schulte is.

24 THE COURT: I guess to play devil's advocate, they
25 will be asked if they know who Joshua Schulte is, so if they do

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1 know him they well say "yes" to that.

2 MR. DeCASTRO: Sometimes it rings a bell in different
3 ways for people so a name sometimes just rings a different
4 bell, *Oh, now I'm making I the connection I didn't make before.*
5 I think it makes sense. It will stick out for us only, I don't
6 think it sticks out to potential jurors.

7 THE COURT: I will think about it. I think my
8 inclination is probably to include it as part of a longer list.
9 There are all sorts of questions that I pose that I think
10 jurors, first of all, they're not going to remember when it
11 comes time to deliberate the questions that I ask, but second,
12 all sorts of questions about, for instance, if they have any
13 experience in a law office or with a court that they probably
14 don't understand the relevance or significance of and probably
15 therefore wouldn't stick out to them.

16 Second is the government's request at paragraph 37
17 requests a question regarding, among the evidence that the
18 government expects at trial, are certain electronic
19 communications. I wanted to know is that still relevant in
20 light of your plan to forego introduction of the IRC chats and
21 the Google searches? I don't know enough about the evidence
22 here to know if that is what that question referred to and
23 therefore it should be omitted now or if it is still relevant.

24 MR. DENTON: No, your Honor. I think you can take
25 that one out.

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1 THE COURT: All right. Mr. DeCastro, does Mr. Schulte
2 waive his right to be present at side bars with prospective
3 jurors? If not, I want to make sure we are all on the same
4 page. Last time we managed to do it with the marshals dressed
5 in counsel-type attire and I think it was not necessarily
6 obvious, but I just want to make sure we are all on the same
7 page.

8 MR. DeCASTRO: No. It is OK. He waives his right to
9 be present at the side bar with jurors.

10 THE COURT: Good. Just to go over the jury selection
11 method, certainly the government knows how it works in my
12 courtroom, it is described in an attachment to my individual
13 rules and practices for trial which you should familiarize
14 yourselves with so you can look at it there. But, just in
15 brief, I use the struck panel method as many of my colleagues
16 do. I will qualify 32 jurors, both sides will then exercise
17 peremptory challenges simultaneously, that is the key point to
18 emphasize. That is to say, you will each make a list of the
19 jurors that you wish to strike, you will exchange those lists,
20 and then they'll be given to me and, absent a motion, the jury
21 will be determined based on your respective strikes.

22 The second thing to make very clear here is the
23 regular potential jurors here are jurors 1 through 28, 29
24 through 32 are the prospective alternate jurors. So when
25 exercising your strikes that is 10 strikes for the defendant,

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1 six for the government. As to the regular jurors, you should
2 limit yourselves to jurors no. 1 through 28, and when
3 exercising your one additional strike on alternates, 29 through
4 32. If there are overlapping strikes, that is to say you both
5 strike the same juror, the regular jury will be the 12 lowest
6 number jurors from 1 through 28, the alternates will be the two
7 lowest jurors 29 through 32. If there are no overlaps, then we
8 will be left with 12 and 2 respectively and there is no issue
9 on that score.

10 Any questions about any of that?

11 MR. DENTON: No, your Honor.

12 MR. DeCASTRO: No, your Honor.

13 THE COURT: Very good.

14 Other trial-related issues. It sounds like this trial
15 may be a week-long trial, given or take. My guess is I will
16 probably tell the prospective jurors that it may last up to two
17 weeks but perhaps shorter, just out of an abundance of caution.
18 Any thoughts on that front?

19 MR. DENTON: No, your Honor. I think our only
20 question is whether the Court intended to do anything different
21 on Friday for the trial day.

22 THE COURT: Well, let me talk about scheduling.

23 As you may know, my general practice which I plan to
24 adhere to here is on day one when we are selecting a jury or
25 until we have a jury, we will go from 9:00 to 5:00 with

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1 appropriate breaks and, obviously, a longer lunch. Once we
2 have a jury, which again I hope will be on Monday afternoon,
3 then every day thereafter, until we get to summations and
4 deliberations, will be 9:00 to 2:30 with one, and only one,
5 half-hour break, and that will be strictly enforced. My plan
6 on the Friday, because it is the start of a Jewish holiday, is
7 to end at 2:30. I observe that holiday, that's sufficient for
8 me. I'm guessing it would be sufficient for most, if not all
9 jurors, but if somebody articulates an issue on that front --
10 and I will tell them that as part of jury selection -- we will
11 address it but that is my plan.

12 Does that work for everybody here?

13 MR. DENTON: Yes, your Honor.

14 MR. DeCASTRO: Works here.

15 THE COURT: And once we get to summations and
16 deliberations, as I will tell the jurors I may change the
17 schedule just to ensure, for instance, that all the summations
18 ideally occur in one day and they can deliberate as long as
19 they want. Well, not as long as they want but longer than
20 2:30. Having said that, I am planning to end Friday at 2:30.
21 So if, by chance, we get to summations, we may not do them on
22 Friday, we will have to play it by ear and see where things
23 are. But the point is I'm not going to go until 5:00 on Friday
24 given the start of the holiday.

25 Again, familiarize yourselves with my individual rules

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1 and practices for trial. Some of you have already experienced
2 trial with me so you have a sense of them, but in particular I
3 would draw your attention to rules regarding objections and
4 handling of exhibits and emphasize, number one, that I don't
5 entertain speaking objections. It generally suffices just to
6 say "objection" or if you think that I might not appreciate or
7 understand the ground for the objection you can state in one or
8 two words what that is "Objection. Foundation." "Objection.
9 Hearsay." "Objection. Relevance." Something of that nature
10 but don't go beyond that. If there is a need to discuss
11 something in depth we will do it at the next break and I don't
12 want that happening in front of the jury.

13 Relatedly, as I said before, I try to keep side bars
14 to zero but certainly to an absolute minimum, so that is
15 something you should understand and, therefore, if you can
16 identify any issues, you should raise them with me sooner
17 rather than later and outside the presence of the jury.

18 You do have to have your witnesses available and ready
19 to go when the time comes. If one witness finishes and the
20 next witness is not available to take the stand at that time,
21 then I will deem that side to have rested and we will proceed
22 to the next phase of the case. So plan accordingly.

23 Mr. DeCastro -- sorry. Go ahead.

24 (Counsel conferring)

25 MR. DeCASTRO: Sorry. Go ahead, Judge.

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1 THE COURT: My law clerk reminded me that I skipped
2 over something important, which is I did want to discuss with
3 you the description of the case that I propose to give to the
4 jury during jury selection. Before he gives you a copy of the
5 description let me just give you an introduction which is that
6 it slightly differs from what I would normally do. Normally I
7 would just include a fairly dry recitation of the charges.
8 Here, based in part on my intuitions and on conversations that
9 I had with other judges who have tried child pornography
10 cases -- I have not myself -- I decided to at least propose for
11 your consideration something a little bit different, which is
12 to say that to discuss with the prospective jurors what --
13 well, you will see in a moment, but one of my colleagues in
14 particular mentioned that in the course of individual colloquy
15 with jurors who expressed misgivings about being selected as
16 jurors in a case involving child pornography, that she found it
17 very helpful to kind of put them at ease to say that you are
18 not called upon to express whether you favor or disfavor child
19 pornography, that you are being asked to decide if the
20 government has proved the elements of the crime and that's all
21 you are asked to do. That is to say sort of that they
22 understand the limited nature of their task. Relatedly, I
23 think it might be important for them to understand that they
24 will, as part of the trial given my ruling earlier, be shown
25 some of the relevant images here, but also prepared to sort of

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1 say that it is not in dispute that they constitute child
2 pornography and focus on what I understand the central issue to
3 be, which is Mr. Schulte's knowledge.

4 Part of the theory here is that some of what I propose
5 to say here is stuff that I probably would say in the course of
6 jury selection in response to answers that jurors may give
7 publicly or otherwise and in that regard maybe it's better and
8 more effective to do it prophylactically and at the outset than
9 wait until somebody says something that prompts me to say
10 something of this sort.

11 So, with that proviso or introduction, I will have my
12 law clerk hand out what I came up with and we can discuss if
13 you have issues with it and go from there.

14 (Counsel reviewing document)

15 Can we turn to it? I know the government objected to
16 the inclusion of the line that Mr. Schulte had proposed saying
17 I am not charged with creating child pornography or engaging in
18 communications with any children. I did include that. Again,
19 the theory is a little bit that one or more jurors may say I
20 wouldn't have a problem sitting on a trial involving images of
21 child pornography but if I knew that someone had communicated
22 with a child or harmed a child or made it, that would be a
23 different matter, in which case I would obviously say that that
24 is not what this case is, it doesn't involve charges of that
25 nature. So, a little bit on the theory that I have described

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1 earlier, I thought that it might make sense to prophylactically
2 make clear what the case does and doesn't involve.

3 With that, Mr. Denton, your thoughts?

4 MR. DENTON: Sure, your Honor.

5 One entirely ministerial on line 13. Just for
6 technical reasons I would suggest maybe the "receipt,
7 possession and transportation" rather than "transfer of child
8 pornography." I think we would ask that the Court take out the
9 next two sentences. I understand the logic there. I think
10 it's a little bit odd to get into what he is not charged with.
11 I think to the extent that is a concern, that is one that can
12 be addressed at side bar with individual jurors. It seems like
13 fewer people are likely to have that kind of parsing concern
14 than people would have kind of the more global concerns that
15 the Court is appropriately trying to put them at ease about.

16 And then I think with respect to the second to last
17 paragraph on page 2 --

18 THE COURT: Wait. Can I stop you for a moment?

19 First of all, no issue with changing it to
20 "transportation," that is, indeed, the right word so thank you
21 for that.

22 When you say the next two sentences?

23 MR. DENTON: The line about what Mr. Schulte is not
24 charged with, and then also sort of "the few, if any people,
25 approve of child pornography." I think rather than sort of

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1 inviting any consideration of the approval of child
2 pornography, the point that the Court made a moment ago I think
3 is best communicated by the next sentence which is just telling
4 them nothing about this case has to do with approval or
5 disapproval of the particular images and whether few people do
6 or many people do, it is just not something that we need to
7 invite any speculation or commentary about from the jury.

8 THE COURT: OK. Carry on. Was there something else?

9 MR. DENTON: Only on page 2, lines 3 to 5. I think,
10 your Honor, I don't think it's necessary to define, in the
11 preliminary instructions, what the central issue is or what the
12 sort of question about what the government will be able to
13 prove is. I think it would sort of suffice to move to the
14 final conclusion and say, all those selected as jurors will see
15 some of the materials, they will only be a minor part of the
16 evidence. The Court will give more fulsome instructions on
17 what the government has to prove. I think it just sort of
18 invites concerns to isolate something separate from the broader
19 charge the Court will give.

20 THE COURT: So, you would propose to strike the
21 sentence beginning: "Instead" on line 3?

22 MR. DENTON: Yes; and then ending after "pornography"
23 on line 5.

24 THE COURT: Mr. DeCastro, your thoughts generally and
25 then we can go through the government's proposed changes.

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1 MR. DeCASTRO: Can I have one second, Judge?

2 THE COURT: Sure.

3 (Defendant and counsel conferring)

4 MR. DeCASTRO: We have no problem with
5 "transportation," which is line 13.

6 THE COURT: Let me step back. Are you good with this
7 as a general idea? Then we can discuss the particulars.

8 MR. DeCASTRO: Yes; as a general idea, yes.

9 THE COURT: Now particulars then. So we will change
10 "transfer" to "transportation."

11 MR. DeCASTRO: We don't have any objection to removing
12 "the few, if any people, approve of child pornography," which
13 is line 15.

14 THE COURT: OK. But I take it you would like to
15 include --

16 MR. DeCASTRO: Yes.

17 THE COURT: -- what he is not charged with.

18 MR. DeCASTRO: Correct. That was in our original
19 proposal. I think it is important. I think it, like page 2, I
20 mean, I think it gives potential jurors some comfort once they
21 hear the charge, nature of the charges and I think the Court
22 articulated well what happens in jury selection in my
23 understanding of these cases.

24 For page 2, I think line 1, I think there is an "or"
25 that was supposed to be "for". Or expected to view many such

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1 materials or for very long -- oh no. That's fine. Sorry about
2 that.

3 So for the line which is line 3 on page 2, I think
4 that the government wanted to strike, I think we would prefer
5 that it remain in. I would propose a slight edit. So the
6 sentence the Court is giving: "Instead, the central issue is
7 whether the government will be able to prove beyond a
8 reasonable doubt that Mr. Schulte knew that the materials were
9 child pornography." I thought that we could change that so say
10 that "Mr. Schulte knew of the existence of those materials and
11 that they were child pornography." That's my proposal. And
12 the reason why I think we should keep it in is largely for the
13 same reasons that it is in the beginning, it is just telling
14 the jury that you are going to be here and be asked to
15 essentially answer some specific questions, not to be opining
16 on child pornography and approval or disapproval of it but
17 there is a specific issue that you are going to hear about and
18 probably hear about an hour later when we open. So, I don't
19 think there is any harm in telling the jury what the issue is
20 here.

21 THE COURT: Very good. So, number one, turning back
22 to page 1, line 13 I will change "transfer" to "transportation"
23 and then I am going to leave in that he is not charged with
24 creating child pornography or engaging in sexual
25 communications. I certainly understand the government's point

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but it is also an accurate statement and I think it will put some jurors at ease. What I would propose to do is set that off with a semicolon. "So, as you just heard, they involve the receipt, possession, and transportation of child pornography; Mr. Schulte is not charged with creating child pornography or engaging in sexual communications with any children." Actually I just realized that I am just reading this so the jury won't know if it is a period or semicolon but that's beside the point. And then, strike the next sentence about "few, if any," and start with: "To be clear, if you are selected as a juror..." and go on from there. So, that's page 1. And then on page 2, I will leave that sentence in. As Mr. DeCastro noted, I think it will be apparent during openings shortly thereafter and in that regard won't prejudice anybody. I assume that the defense may request a defense theory of the case instruction at the conclusion and I presume it will focus on these things so I think it will give comfort to some jurors to know that that's essentially the narrow sort of issue that they will really be asked to focus on and probably obviate some complications in jury selection. So, I will, at Mr. DeCastro's request, change it to line 4, to that "Mr. Schulte knew of the existence of the materials and that they were child pornography" and otherwise I will leave that line in.

24 All right.

25 MR. DENTON: Your Honor, given that you are leaving

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1 that in, purely as a stylistic convention in the format, on
2 page 1, line 17 to 18, the Court frames it as, "Your task will
3 be to decide whether the government has proved..." and so I
4 think it might make sense in this sentence as well to say,
5 "The central issue will be whether the government has proven or
6 has proved..." Just for parallelism sake, if nothing else, but
7 hardly a major point.

8 THE COURT: I'm not sure I understand the suggestion
9 but I think I am fine with what it currently is, so given that
10 you said it is not a major point, I will reject it.

11 We are almost done here. A couple other housekeeping
12 matters. Mr. DeCastro, you alluded earlier to some issues with
13 respect to the delivery of clothing. I don't think I signed a
14 clothing order. I may need to.

15 MR. DeCASTRO: We have been trying to iron out, with
16 the MDC, the clothes that he had already there which we picked
17 up.

18 (Defendant and counsel conferring)

19 MR. DeCASTRO: The MDC said the old order was fine.

20 THE COURT: Good.

21 MR. DeCASTRO: They found what they had, they gave it
22 back to us so we could launder it and we are delivering it
23 tomorrow.

24 THE COURT: OK.

25 MR. DeCASTRO: So that shouldn't be an issue.

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1 THE COURT: Bottom line if you need something from me,
2 let me know, but I want to make sure that is taken care of.

3 Am I correct in assuming that neither side intends to
4 use demonstratives during opening statements? If so, I want to
5 make sure the other side is aware and I rule on any objections.

6 Mr. Denton?

7 MR. DENTON: No, your Honor.

8 MR. DeCASTRO: No, Judge.

9 THE COURT: No issue there.

10 Any issues with respect to witnesses being present in
11 the courtroom, either fact or expert? I don't know if there is
12 a need for experts to be present. They can be present in some
13 circumstances but to the extent that anyone is not on the list
14 of those who are permitted to be in the courtroom, under
15 Rule 615 we should address it and see if there are any issues.

16 Mr. Denton?

17 MR. DENTON: The only non-expert witness we plan to
18 call is Special Agent Evanchec, who is going to go first, and I
19 think we planned to have the other two witnesses here. We have
20 no objection to Dr. Kiper being here and hopefully that will
21 make things go quickly when the time comes.

22 MR. DeCASTRO: Same.

23 THE COURT: All right. So then there is no issue on
24 that front.

25 The bottom line admonition is do whatever you can to

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1 ensure that there are no delays, especially when we get the
2 jury in the box, so I would encourage you to make sure this
3 week that you come here and do a run through, a tech run
4 through to make sure that your equipment is working, you know
5 how to use the system, and there are no issues on that score.
6 I would also encourage you, each morning, to do another run
7 through, that is to say make sure it is working and test things
8 so that we don't have any problems. I also have a backup plan
9 in case we do have problems.

10 Again, you have to have your witnesses here when they
11 are ready to be called and if they are not, you will be deemed
12 to have rested but it sounds like they'll all be here anyway so
13 that's not an issue.

14 If you have any audiovisual needs, that is to say
15 electronic device orders that you need, you better ask me
16 sooner rather than later to make sure there is no issues on
17 that front. Again, I would encourage you to make arrangements
18 with my chambers to do a tech walk-through or dry run, just to
19 make sure that everybody has whatever they need and you can
20 iron out any issues in advance.

21 That covers everything that I planed to discuss today.
22 Anything else from the government?

23 MR. DENTON: No, your Honor.

24 THE COURT: Mr. DeCastro?

25 MR. DeCASTRO: No, Judge.

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1 THE COURT: All right. So, you know how to find me if
2 you need to find me. There are a couple things that you will
3 be submitting today and in the coming days. Otherwise, I will
4 see you at 9:30 on Monday and we can take care of any final
5 lingering issues at that time and then get started with the
6 jury when they are ready to go.

7 Needless to say, trial is in this courtroom so come
8 here. And, with that, have a good few days and I will see you
9 on Monday.

10 Thanked.

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